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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON LLOYD BRYSON, Defendant and Appellant.	A155582 (Sonoma County Super. Ct. No. SCR7099571)

After a jury convicted defendant Jason Lloyd Bryson of second degree robbery, Bryson moved for a new trial. Bryson appeals from the court's denial of that motion, asserting the court abused its discretion by applying an incorrect legal standard and relying on three impermissible evidentiary factors. He also argues that we should strike a doubling of a sentence under the Three Strikes law and the imposition of two five-year sentence enhancements for two prior serious felony convictions and remand for resentencing, arguments which the People either agree with or do not oppose. We strike the Three Strikes sentence and the two five-year sentence enhancements. We remand for the trial court to exercise its discretion as to one of those enhancements and to resentence Bryson in a manner consistent with this opinion. We affirm the decision in all other respects.

BACKGROUND

In May 2018, the Sonoma County District Attorney charged Bryson in a first amended information with second degree robbery, assault with a deadly weapon, criminal threats, and grand theft of personal property exceeding a value of $950, and made certain sentence enhancement allegations. A jury trial followed.

I.

Chad Empey's Testimony

Chad Empey testified that he was alone in his office at his Petaluma, California store around 9:00 p.m. on November 13, 2017, when he saw on a security feed that Bryson, whom he did not know, was "going at things" in Empey's car in the store's illuminated parking lot. Empey ran outside and yelled at Bryson to stop. Bryson ran away and Empey pursued him about 30 yards into the street while demanding his things back. Bryson spun around, moved towards Empey with hands clenched and said, "I'll fucking kill you." Empey testified that he became afraid, explaining: "I thought, oh, my God, what have I done, I'm out here in the middle of the street, I have no phone, I have no weapons, there's nobody around, and here's this guy coming at me and I chased him into the street, so I felt like I made a serious mistake and I wanted to go back to my office."

Empey further testified that Bryson swung at him, missed and reached into his own pocket, which caused Empey to fear he had a weapon and that he, Empey, "was doomed." Empey swatted Bryson's hand away and, as Bryson tussled with him, he grabbed Bryson's glasses. Bryson again came at Empey while reaching into his pocket and punched Empey in the shoulder, then ran to a red car and got in it. Empey followed and, upon reaching Bryson's car, saw his personal property, including a box of beer, in the back

seat. He succeeded in opening the car door and was grabbing the beer box when the car moved a few inches backward in a jerking motion, causing the open door to hit him. He fell down as he pulled out the beer box, which fell onto the street.

Empey said he got up, opened the car's driver's-side door and landed in Bryson's lap. Bryson reached for something on the passenger-side floor and, Empey testified, he tried to get out of the car because he "didn't know what [Bryson] was going for." As he pushed himself out of the car, he grabbed Bryson's cell phone from inside Bryson's left jacket pocket. Once out of the car, Empey continued to demand his things and, as Bryson tried to shift the car's gears, Empey grabbed the driver's-side door and tried with all his body weight to open it. Bryson held the door shut and then let it go, causing Empey to spin around, hit the car's front fender and fall to the ground. Looking at Empey, Bryson turned the car towards him. The car "lurched forward" and a front tire and fender hit Empey in his left shoulder, knocking him back. Bryson then "floored" it and the car sped way. Empey, uninjured except for a hand that he noticed the next morning was "a little scuffed" (of which photos were introduced), immediately called the police.

Empey further testified that Bryson fled the scene with numerous items belonging to Empey, including car keys to two vehicles, keys to his office, two jackets, chargers, cables, a black bag, a stereo faceplate and $200 in lottery tickets.

II.

Empey's Interview by Police

Petaluma Police Officer Alec Thompson testified that he interviewed Empey at the scene of the incident less than twenty minutes after it occurred.

He received a cell phone and glasses from Empey, and the cell phone led to Bryson's arrest later that night.

Thompson's interview of Empey was recorded on Thompson's body camera, and the recording was played for the jury. Refreshing his recollection at times from a transcript of the recording, Thompson testified that, among other things, Empey said Bryson pushed him against a wall; he and Bryson ran into the street; Bryson, fist clenched, threatened to kill him; he grabbed Bryson's glasses and threw them down; he was knocked backwards when Bryson let go of the driver's-side door while he was grabbing it and then was hit by the car as Bryson accelerated; and that he was not injured. But the next day, Empey emailed Thompson photos of injuries.

Thompson described Empey's demeanor during this interview as "pretty scared," and said Empey appeared "frazzled like an incident had just occurred" that "was overwhelming for him." Empey's statements were "scattered" and Thompson thought that "the incident had affected [Empey] to the point where . . . his ability to kind of keep some of these things straight was hard for him."

Surveillance video taken of the scene from different cameras during the incident was shown to the jury. Empey testified that it showed Bryson rummaging through one of Empey's vehicles in the parking lot outside Empey's store; holding items belonging to Empey and going into another of Empey's vehicles; Empey running after Bryson and yelling for him to return his belongings; shadow movements of the two "tussling in the street or something"; Bryson's brake lights coming on and his car pulling away; and Empey getting up and running back to his office.

III.

The Defense

Bryson's defense centered on undermining Empey's credibility. Bryson contends Empey's testimony was inconsistent with his statements to Thompson that Bryson pushed him up against a wall, that he threw Bryson's glasses on the ground and that Bryson put his car in reverse. He also points out that Thompson's police report did not mention anything about Empey's keys being stolen, that Thompson testified he did not see any injuries on Empey, that an expert testified the surveillance video, once enhanced, did not depict Bryson's car ever going in reverse and that Empey filed an insurance claim for the missing property.

IV.

The Verdicts and Bryson's Motion for a New Trial

The jury found Bryson guilty of second degree robbery and not guilty of criminal threats or assault with a deadly weapon. It could not reach a verdict on simple assault, which it considered as a lesser included offense (presumably to the assault with a deadly weapon count, though this is unclear from the record). The trial court declared a mistrial regarding the simple assault and dismissed the grand theft count. The court conducted a bench trial and found true two prior serious or violent felony convictions and two prior strikes under the Three Strikes law, one of which it later struck.

Bryson moved for a new trial under Penal Code section 1181, subdivision (6)[1] on several grounds, including a purported lack of evidence that the robbery was committed with force or fear. The trial court denied Bryson's motion. It found that, even if it "were to discount much or most of

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[1] All statutory references are to the Penal Code unless otherwise stated.

what Mr. Empey said," there was sufficient evidence that Empey was in fear of Bryson during the robbery. This evidence included Empey's demeanor while testifying, the officer's body camera video showing Empey in an "excited state" immediately after the incident and Empey's testimony that he was trying to get his things out of Bryson's car when Bryson moved the car to get away, causing Empey to back out, which account was corroborated by the physical evidence of beer that was found in the street.

The court said that, based on its discussion with the jury foreperson after trial, the jury appeared to have struggled with Empey's credibility as a witness, in view of its inability to reach a verdict on the simple assault charge. However, the court did not think the jury's acquittal of Bryson on the criminal threats and assault with a deadly weapon counts necessarily meant the jury concluded that "those facts didn't happen." Ultimately, the court said, it "accept[ed] and adopt[ed]" the prosecution's arguments about the seemingly inconsistent jury verdicts, stating it was difficult to "know precisely why a jury did or did not make the findings that they made."

The trial court denied Bryson probation, granted his motion to strike a 1995 California prior conviction, but denied the motion as to a 1999 out-of-state prior strike conviction. The court sentenced Bryson to the five-year upper term for the robbery, doubled to 10 years due to the prior strike conviction, and to an additional five years each for two prior serious felony convictions. All told, the court sentenced Bryson to a total of 20 years in state prison.

Bryson timely filed a notice of appeal.

DISCUSSION

I.

The Court Did Not Err in Denying Bryson's Motion for a New Trial.

Bryson argues the trial court committed legal error and considered impermissible factors by relying on three categories of evidence in denying his motion for a new trial based on insufficient evidence of force or fear. He contends the court should not have relied on Empey's demeanor while testifying, post-robbery excitement as evidenced on the body camera video and backing out of Bryson's car to avoid being hit. We conclude the court did not err.

A. Legal Standards

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; *People v. Gomez* (2008) 43 Cal.4th 249, 254 ["To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his presence"].) Regarding the force or fear requirement, "[i]t is enough that defendant forcibly prevented the victims from recovering their property, even for a short time." (*People v. Pham* (1993) 15 Cal.App.4th 61, 68; *id.* at p. 67 [sufficient evidence that the defendant forcibly "carried away the victims' property when he physically resisted their attempts to regain it"].)

"To establish a robbery was committed by means of fear, the prosecution 'must present evidence " . . . that the victim was *in fact afraid*, and that such fear allowed the crime to be accomplished." ' " (*People v. Morehead* (2011) 191 Cal.App.4th 765, 772 (*Morehead*), italics added.) Thus, the fear element is subjective in nature. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1319.) However, the victim need not explicitly testify

that he or she was afraid of injury where there is evidence from which it can be inferred that the victim was in fact afraid of injury. (*Morehead*, at p. 775.) "The fear is sufficient if it facilitated the defendant's taking of the property. Thus, any intimidation, even without threats, may be sufficient." (*People v. Mullins* (2018) 19 Cal.App.5th 594, 604, citing *Morehead*, at pp. 774-775.) "However, given the language of section 212, the intimidation must not only produce fear, but the fear must be of the infliction of injury." (*People v. Montalvo* (2019) 36 Cal.App.5th 597, 612.)

"All the elements [of robbery] must be satisfied before the crime is completed. However, . . . no artificial parsing is required as to the precise moment or order in which the elements are satisfied." (*People v. Gomez*, *supra*, 43 Cal.4th at p. 254, fn. omitted.) Robbery is a continuing offense, and the theft is only completed when the perpetrator reaches a place of temporary safety with the property. (*Id.* at p. 255.)

Section 1181, subdivision (6), authorizes trial courts to grant a new trial "[w]hen the verdict or finding is contrary to law or evidence." In assessing motions for a new trial, a trial court "independently examines the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' " (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) Thus, " '[t]he trial court is not bound by the jury's determinations as to the credibility of witnesses or as to the weight or effect to be accorded to the evidence.' " (*People v. Watts* (2018) 22 Cal.App.5th 102, 112.)

We review motions for a new trial for abuse of discretion. (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1252.) The trial court abuses its discretion if it applies the wrong legal standard or bases its decision on "impermissible factors." (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) When

such an abuse of discretion occurs, we must vacate the trial court's ruling and remand the matter so the court may properly consider the new trial motion. (*People v. Watts*, *supra*, 22 Cal.App.5th at p. 115.) If there is no legal error, the trial court does not abuse its discretion so long as substantial evidence supports conviction. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 365 [affirming denial of new trial motion because sufficient evidence supported conviction].)

B. The Court's Consideration of Empey's Witness Demeanor

In denying Bryson's motion for a new trial, the trial court stated that Empey's "demeanor while testifying, regardless of whether any particular statements were or were not made by [Bryson], conveyed fear by Mr. Empey of [Bryson]." Bryson argues this was legal error because Empey's demeanor "was not part of the actual evidence at trial regarding whether the robbery was accomplished through the use of fear." Bryson is wrong.

Evidence Code section 780, subdivision (a), allows both courts and juries to consider a witness's "demeanor while testifying and the manner in which he testifies" to "prove or disprove the truthfulness of his testimony." Witness demeanor has long been considered as valuable evidence in evaluating a witness's credibility. (See, e.g., *People v. Adams* (1993) 19 Cal.App.4th 412, 437 ["The confrontation clause requires that a witness give a statement under oath and submit to cross-examination, and that the jury be able ' "to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility" ' "].) Witness demeanor " 'is a part of the evidence' " and fact finders should consider " 'the whole nexus of sense impressions which they get from a witness.' " (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1414, quoting Judge Learned Hand.) Thus, even in *People v. Moreda* (2004) 118 Cal.App.4th 507, on which Bryson

relies to argue his demeanor was outside the record, the court observed that "[c]ertainly, a judge's first-hand observations of the demeanor of a witness could be useful when ruling on a motion for new trial." (*Id*. at p. 514.)

The trial court here, acting as a "13th juror," considered Empey's demeanor while testifying and concluded that it supported a finding that he was afraid during the robbery. This was particularly appropriate because as the prosecution points out, the main issue at trial was Empey's credibility. Bryson gives us no reason why the court could not infer from Empey's demeanor in recounting his state of mind and the robbery itself that he was testifying truthfully about his fear.

Indeed, Bryson cites no case law that supports his argument. He cites an inapposite case, *People v. Watson* (1983) 150 Cal.App.3d 313, 318-319, disapproved on other grounds in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn. 3, in which the trial court denied a new trial motion based on its judicial notice of commonly known traffic conditions that were never before the jury. He also insists that "deciding a witness is not credible is fundamentally different from using a defendant's demeanor while testifying to prove an actual element of a criminal offense." We disagree that the trial court used his demeanor to prove an element of robbery. Rather, Empey testified directly about the fear he experienced during the robbery. (See *People v. Hayes* (1990) 52 Cal.3d 577, 639 [holding that the victim's testimony "was direct evidence of the elements of . . . robbery"].) The court's statements, viewed in context, indicate it considered his demeanor while testifying in order to determine the veracity of this aspect of Empey's testimony. The law has long made plain that such consideration is appropriate.

C. The Court's Consideration of Empey's Post-Incident Excited State

The trial court also based its denial of Bryson's motion for a new trial on the fact that "[t]he body camera video of [Empey] from immediately after the event showed a person in a very excited state, which is consistent with experiencing fear." Bryson argues this too was improper because excitement does not necessarily prove fear and because excitement after the fact does not establish fear during the fact. We conclude the trial court did not abuse its discretion in considering this evidence either.

Bryson concedes that, as case law makes clear, "[f]ear may be inferred from the circumstances in which the property is taken." (*Morehead*, *supra*, 191 Cal.App.4th at p. 775.) Thus, there is no need for the prosecution to prove an "express threat," use of a weapon, or resistance by the victim for the fact finder to conclude that the robbery was accomplished by use of fear. (*Ibid.*) The only requirement is that the record demonstrates " ' "conduct, words, or circumstances reasonably calculated to produce fear." ' " (*People v. Brew* (1991) 2 Cal.App.4th 99, 104.) Bryson argues that excitement does not *necessarily* show fear, and that fear *during* the robbery cannot be reasonably inferred from Empey's *post*-robbery excitement. We disagree. The transcript of the body camera video (the video itself is not contained in the record) clearly indicates Empey spoke to Thompson within minutes of the robbery's occurrence in an excited state; for example, he spoke in convoluted sentences and stuttered over words as if speaking quickly and excitedly.[2] Bryson simply offers no legal reason why the court (and the jury) could not

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[2] For example, Empey told Thompson: "And he ran right up in front of the car where we started arguing and then he was like, I'll fucking kill you, I'll fucking kill you, and I'm—, and I was like, he could have a weapon, I didn't know. So I'm like trying to take it easy but the same time he's—, I—, he can't leave, he's got my shit, I can see it in his car."

reasonably infer from this evidence that Empey experienced fear during the robbery. The strength of this evidence may be debated, but not the legitimacy of its consideration. The trial court appropriately considered it.

D. The Court's Consideration of Empey's Backing Out of Bryson's Car

Finally, Bryson argues the trial court erred when it relied on *People v. Magallanes* (2009) 173 Cal.App.4th 529 (*Magallanes*) to find that "[t]he simple act of [Empey] backing out of [Bryson's] car after having leaned in, to avoid being hit, while alone in a relatively deserted area after dark is sufficient to establish fear." Bryson argues the facts of that case are so inapposite that the court's reliance on *Magallanes* "amounts to a misapplication of the law of robbery." He further contends that "the totality of the circumstances show Empey pursuing [Bryson] with gusto," indicating he had no fear. We disagree.

The victim in *Magallanes* left her car running while placing her young son in a car seat. (*Magallanes, supra,* 173 Cal.App.4th at p. 532.) After hearing a "revving sound," the victim looked up and saw the defendant sitting in the driver's seat attempting to put the car in gear. (*Ibid.*) The victim testified that, fearing for her and her son's safety, she pulled her son out of the car, then tried to open the front passenger door, banged on the car window and cursed at the defendant. (*Ibid.*) About 10 or 15 seconds later, the defendant was able to get the car in gear and drove away. (*Id.* at pp. 532-533.) The defendant did not turn around or speak to the victim during the encounter. (*Id.* at p. 532.) The appellate court concluded that the victim's backing out of the car sufficiently established her fear. (*Id.* at p. 534.)

Despite factual differences, the trial court in the present case reasonably relied on *Magallanes* as establishing that a "victim's attempts at resistance do not disprove force or fear was used in the commission of the

crime." (*Magallanes*, *supra*, 173 Cal.App.4th at p. 534.) The resistance in that case—the victim, seeing the defendant in the driver's seat, pulled her son out of the car, then tried to open the car door, banged on the window and cursed at the defendant—was similar to Empey's conduct after he arrived at Bryson's car. Empey testified that he was able to pull the beer box out of the car, then was able to get into the driver's side of the car and landed in Bryson's lap, whereupon he saw Bryson reaching for something on the floor of the passenger side and immediately backed out of the car, after which he again attempted to open the car door. This testimony indicates that, despite Empey's resistance of Bryson, he backed out of the car when he saw Bryson reach for something because he "didn't know what [Bryson] was going for." The plain implication of this testimony is that Empey feared Bryson would hit or harm him with something. In other words, fear can be inferred from Empey's backing out of Bryson's car at that time, similar to the court's conclusion about the victim's state of mind in *Magallanes*.

Bryson also argues that Empey acted towards Bryson with such "gusto" that Empey could not have been afraid during the encounter. This argument is unpersuasive. Bryson ignores the simple fact that a person can feel more than one emotion at the same time, for example, anger or a desire to regain one's property, on the one hand, and fear, on the other. Indeed, *Magallanes* described several cases in which the victims of carjacking and robberies pursued their attackers while expressing anger, typically by yelling threats or banging on car windows. (*Magallanes, supra*, 173 Cal.App.4th at p. 534; see, e.g., *People v. Davison* (1995) 32 Cal.App.4th 206, 216-217 [evidence that victim stepped away from cash machine in fear of defendant was not negated by her cursing at and chasing him].) The court concluded that, "[b]y yelling at defendant and banging on the locked door of the car, [the victim] was

expressing emotions in addition to fear, including anger; [the victim's] anger does not negate her fear, however." (*Magallanes*, at p. 534.) Similarly, to the extent some of Empey's actions may show a "gusto" on his part, they do not negate the evidence of his fear. Rather, they suggest he may have experienced other emotions in addition to fear, as did the victim in *Magallanes*.

In short, the trial court appropriately relied on *Magallanes* in determining whether Bryson took Empey's property by force or fear.

II.

The Court Erred in Finding Bryson Had Suffered a Prior Strike and a Prior Serious Felony Conviction Based on His Washington Conviction.

Bryson next argues that the court erred in finding that a prior assault with a deadly weapon conviction that he suffered in the state of Washington (Washington conviction) established he had a prior "strike" and a prior serious felony conviction, the latter of which added five years to his sentence. The People agree, and we do as well. We must strike these findings and remand for resentencing.

A. Relevant Proceedings Below

At the bench trial on the prior strike and five-year enhancement allegations, the trial court admitted into evidence documents regarding Bryson's 2000 conviction by guilty plea in Washington of, among other things, second degree assault with a deadly weapon, that being a firearm, under the Revised Code of Washington section 9A.36.021(1)(c). The court specifically found the Washington conviction satisfied certain criteria listed in section 1192.7, subdivision (c), and established the truth of the prior strike and five-year enhancement allegations. As a result of these findings, the court doubled Bryson's five-year prison term for robbery under

section 170.12, subdivision (c)(1)[3] and added five years to his sentence under section 667, subdivision (a)(1).[4]

B. Analysis

In essence, Bryson argues (and the People agree) that the evidence regarding his Washington conviction for assault with a deadly weapon, that being a firearm, is insufficient to establish a prior strike or serious felony conviction for purposes of these enhancements because that crime as defined by Washington law does not necessarily satisfy all of the elements of such a crime under California law. We agree.

Based on Bryson's Washington conviction, the court found that Bryson had suffered a prior serious felony and therefore was subject to the five-year sentence enhancement provided for under section 667, given that his robbery conviction also constituted a serious felony. Section 667 adopts the definition of a prior serious felony contained in section 1192.7, subdivision (c). (§ 667, subd. (d).) The trial court found that Bryson's Washington conviction qualified as a serious felony under section 1192.7, subdivisions (c)(8) ("any

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[3] Section 1170.12, subdivision (c)(1) provides in relevant part that, in addition to any other enhancements that may apply, a defendant convicted of a felony who has a prior violent or serious felony conviction that has been pled and proved, the determinate term shall be twice the term otherwise provided. A prior serious or violent felony includes a felony conviction in another jurisdiction if it is for an offense that includes all the elements of a crime defined as a serious or violent felony in this state. (*Id.*, subd. (b)(2).) These provisions are part of the Three Strikes Law, and a finding under subdivision (c)(1) is sometimes referred to as a "prior strike conviction."

[4] Section 667, subdivision (a)(1) provides, "Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

felony in which the defendant personally uses a firearm"), (c)(23) ("any felony in which the defendant personally used a dangerous or deadly weapon") and (c)(31) ("assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm . . ."). Accordingly, the trial court imposed an additional five years, to be served consecutively, to Bryson's overall sentence based on the Washington conviction.

Also based on the Washington conviction, the court found Bryson had suffered a prior strike under the so-called "Three Strikes Law" (see §§ 667, 667.5, 1170.12), under which a defendant convicted of a felony who is found to have suffered a prior serious felony is sentenced to double the determinate term imposed for the current crime. (§ 1170.12, subds. (b)(1), (c)(1).)

Under California law, if a defendant has suffered a prior conviction in another state, that prior foreign conviction may be the basis for a longer sentence. "For a prior felony conviction from another jurisdiction to support a [five-year] serious-felony sentence enhancement, the out-of-state crime must 'include[] all of the elements of any serious felony' in California. (§ 667, subd. (a)(1).) For an out-of-state conviction to render a criminal offender eligible for sentencing under the three strikes law (§§ 667, subds. (b)–(i), 1170.12), the foreign crime (1) must be such that, 'if committed in California, [it would be] punishable by imprisonment in the state prison' (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2)), and (2) must 'include[] all of the elements of the particular felony as defined in' section 1192.7 [,subdivision] (c) (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2))." (*People v. Warner* (2006) 39 Cal.4th 548, 552-553.)

We review de novo whether a prior foreign conviction qualifies under California law as a serious or violent felony by examining the relevant statutes. (See *People v. Warner*, *supra*, 39 Cal.4th at pp. 552-555.) We

review for substantial evidence whether sufficient evidence supports a trial court finding that a prior conviction qualifies as strike. (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1132-1133.) However, when "the prior conviction was for an offense that can be committed in multiple ways, and the record of conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066; see also *People v. Miles* (2008) 43 Cal.4th 1074, 1083 [if a prior offense can be committed in multiple ways, and record does not show how it was committed, "a court must presume the conviction was for the least serious form of the offense"].)

Washington law does *not* require that a firearm be loaded in order for it to be found to be a "deadly weapon." That is, under Washington law, a " '[d]eadly weapon' means any . . . loaded *or unloaded* firearm . . . ." (Wash. Rev. Code, § 9A.04.110, subd. (6) (2011), italics added.) But in California assault with a firearm "requires the present ability to inflict violent injury." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Thus, "[a] long line of California decisions holds that an assault is not committed by a person's merely pointing an (unloaded) gun in a threatening manner at another person." (*Id.* at p. 11, fn. 3; *People v. Chance* (2008) 44 Cal.4th 1164, 1172, fn. 7 ["assault cannot be committed with [an] unloaded gun, unless the weapon is used as a bludgeon"].)

The record does not establish that Bryson used a loaded firearm in the Washington crime, and, further, *Delgado* and *Miles* indicate we should presume he did not. Therefore, there is not substantial evidence to support the trial court's finding that Bryson suffered a prior conviction in Washington that should be the basis for a prior strike or prior serious felony sentence enhancement.

The proper remedy is to "remand for a full resentencing . . . so the trial court can exercise its sentencing discretion in light of the changed circumstances." (*People v. Navarro* (2007) 40 Cal.4th 668, 681; accord, *People v. Buycks* (2018) 5 Cal.5th 857, 893-895.) However, as Bryson notes, upon remand the trial court cannot increase his aggregate prison term beyond that originally imposed. (*People v. Brunton* (2018) 23 Cal.App.5th 1097, 1108, quoting *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1253.)

III.

Remand Is Proper for the Court to Exercise Its Sentencing Discretion Regarding the Remaining Prior Serious Felony Conviction.

Bryson also argues the trial court should be given the opportunity to exercise its recently acquired discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.) to strike prior serious felony conviction sentence enhancements that it was required to impose prior to Senate Bill No. 1393's enactment. We have already stricken the prior serious felony conviction enhancement based on the Washington conviction, both for purposes of the Three-Strikes sentence and for purposes of the five-year enhancement, as we have just discussed. However, the trial court also found that Bryson had a prior serious felony conviction in San Bernardino, California (San Bernardino conviction). Bryson asks that we strike the resulting five-year sentence enhancement from this conviction as well so that the trial court may decide anew whether to exercise its discretion to strike it. The People do not oppose Bryson's argument because resentencing is already necessary due to the court's imposition of a Three-Strikes sentence and an improper enhancement based on Bryson's Washington conviction. We agree that striking the mandatory enhancement the court imposed for the San Bernardino conviction and remanding the matter for the court to exercise its discretion regarding that enhancement is appropriate under the circumstances.

When the trial court sentenced Bryson in October 2018, it had no discretion to strike the prior serious felony conviction enhancement that it imposed for the San Bernardino conviction under section 667, subdivision (a). (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Subsequently, when Senate Bill No. 1393 went into effect on January 1, 2019, sections 667, subdivision (a) and 1385, subdivision (b) were amended to give trial courts the discretion to dismiss or strike a prior serious felony conviction allegation for sentencing purposes. (*Garcia*, at p. 965.) The amendments apply retroactively to cases not yet final (*id*. at pp. 971-973). This includes Bryson's case, the appeal of which was pending when the amendments went into effect.

At sentencing, the trial court indicated that, even if it had discretion to strike the prior serious felony conviction enhancement for the San Bernardino conviction under section 667, it would not strike it. Thus, ordinarily remand might not be required. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [noting regarding the addition of sentencing discretion for firearm enhancements imposed under section 12022.53 that if " ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required" ' "].) However, it is not clear what the court might do with its discretion in light of our remand for resentencing based on the court's errors in considering Bryson's Washington conviction. Therefore, we conclude it is appropriate to remand this matter also in order for the court to exercise its sentencing discretion under Senate Bill No. 1393.

DISPOSITION

The judgment is affirmed, but the Three Strikes sentence and five-year sentence enhancement for the prior serious felony conviction, both based on the Washington conviction, are stricken. The five-year enhancement for the prior serious felony conviction based on the San Bernardino conviction is also stricken in order for the trial court to exercise its discretion in the first instance under Senate Bill No. 1393.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.